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7 UNITED STATES DISTRICT COURT
8 SOUTHERN DISTRICT OF CALIFORNIA

9 Case No.: 3:16-CV-2460-AJB-LL

10 LARRY HERNANDEZ,
11 Petitioner,
12
13 v.
14 SCOTT KERNAN,
15 Respondent.

**REPORT AND RECOMMENDATION
FOR ORDER DENYING AMENDED
PETITION FOR WRIT OF HABEAS
CORPUS**

[ECF No. 7]

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17 This Report and Recommendation is submitted to United States District
18 Judge Anthony J. Battaglia pursuant to 28 U.S.C. § 636(b) and Civil Local Rules
19 72.1(d) and HC.2 of the United States District Court for the Southern District of California.

20 On September 28, 2016, Petitioner Larry Hernandez, a state prisoner proceeding *pro*
21 *se*, commenced these habeas corpus proceedings pursuant to 28 U.S.C. § 2254. ECF No. 1
22 (“Pet.”). On October 31, 2016, Petitioner filed a First Amended Petition for Writ of Habeas
23 Corpus. ECF No. 7 (“FAP”). Petitioner challenges his convictions for: (1) sexual battery
24 by restraint; and (2) sexual penetration by foreign object by force, fear or threats. FAP at
25 2; Lodgment 3-3 at 8-18; Lodgment 7 at 2.¹

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28 ¹ Petitioner’s jury convictions for: (1) assault with the intent to commit sexual penetration by foreign
object by force, fear or threats and (2) first degree burglary were reversed by the California Court of
Appeals. Lodgment 7 at 38.

1 On January 4, 2017, Respondent answered the FAP. ECF No. 15. Petitioner did not
2 file a traverse. See Docket. The Court has considered the FAP, Answer, and all supporting
3 documents filed by the Parties.

4 For the reasons set forth below, the Court **RECOMMENDS** that Petitioner's
5 Petition for Writ of Habeas Corpus be **DENIED**.

6 **FACTUAL AND PROCEDURAL BACKGROUND**

7 **I. Facts Of The Underlying Offense**

8 The following facts are taken from the California Court of Appeal's opinion in
9 People v. Larry Hernandez, 2016 Cal. App. Unpub. LEXIS 1641 (Mar. 4, 2016) [Lodgment
10 7]. Absent clear and convincing evidence to the contrary, the Court presumes the state
11 court's factual determinations are correct. 28 U.S.C. § 2254(e)(1); Miller-El v. Cockrell,
12 537 U.S. 322, 340 (2003).

13 Prosecution

14
15 In January 2013, 57-year-old D., lived alone in an apartment in
16 El Centro. D. had been in a wheelchair for 10 years because of a
17 degenerative muscular disease. On January 12, 2013, around
18 3:00 a.m., D. was awakened by a loud noise. She got into her
19 wheelchair, activated the burglar alarm, and wheeled herself
20 toward the bedroom door. D. heard the sound of breaking glass
coming from her living room. When she went to the front door,
she saw that the window was broken. Hernandez was putting his
hand through the window and was trying to unlock the door.

21 D. pushed Hernandez's hand away and attempted to close the
22 door. When Hernandez kept pushing on the door, D. bit one of
23 his right fingers. Nevertheless, Hernandez forced his way in.
24 Hernandez asked D., "Don't you like dick?" D. yelled.
25 Hernandez touched D.'s left breast and vagina over her clothing.
26 He then put his hand inside her underwear and stuck at least one
finger in her vagina.

27 D. tried to push Hernandez away from her. Hernandez hit D.,
28 knocking her out of her wheelchair. Hernandez threw D. to the
ground and removed her pants. D. crossed her legs. Hernandez

1 asked, "Aren't you ill?" and tossed her pants aside. Hernandez
2 grabbed a glass candle holder from a nearby table and
3 unsuccessfully attempted to insert it into D.'s anus.

4 Hernandez stepped outside, returned with a water bottle, rubbed
5 it on D., and inserted the bottle head into D.'s vagina. The bottle
6 cut D. on the interior of her vagina, and she started bleeding. D.
7 cried and yelled for help. Hernandez opened the water bottle and
8 emptied the water onto D.'s body. D. scratched Hernandez on his
9 left cheek. Hernandez then left the apartment. D. rolled over,
10 dragged herself to her wheelchair, wheeled herself to her
11 bedroom, and telephoned her son.

12 Officers with the El Centro Police Department were dispatched
13 to D.'s apartment in response to the alarm she activated. When
14 they arrived, D. was inside her apartment. She was crying and in
15 a great deal of pain. Her arms were covered with blood. Her pants
16 and underwear were on the floor beside her. No one else was in
17 the apartment.

18 When the officers looked around D.'s apartment, they found two
19 articles of clothing and a plastic water bottle by the front door.
20 There was a clear broken glass stem on top of the table and red
21 and clear pieces of glass as well as a broken red glass cup on the
22 floor. The front window was broken and there was blood in the
23 entryway. A blood trail led out the front door, down the sidewalk,
24 and to the east of the apartment complex.

25 Officers Stephen Singh and Ascencion Felix went outside to
26 search for suspects. They spotted Hernandez walking south,
27 away from the apartment complex's south gate. Both officers
28 yelled, "Police, stop." Hernandez kept walking. They yelled a
couple more times, "Police, stop," but Hernandez ignored them.
Hernandez tried to open the gate to the apartments. When
Hernandez discovered the gate was locked, Hernandez continued
to walk away from the officers. Hernandez made a motion with
his hand and tossed a broken clear vase and stem, and a red glass
cup, over a fence near the apartments. Singh ran up to Hernandez,
grabbed his right arm, ordered him to stop, and pulled him to the
ground. Singh kept ordering Hernandez to show the officers his
hands. Hernandez tucked his hands into his chest. Singh pulled
Hernandez's hands behind his back and placed him in handcuffs.

1 There was blood on Hernandez's face, around his wrists, and on
2 his jeans. Singh asked Hernandez why he was walking away
3 from the apartment complex. Hernandez did not respond. Singh
4 asked Hernandez why he had blood on him. Hernandez said he
5 was jumped on the east side. Hernandez stated he did not need
6 medical attention. Singh asked Hernandez who jumped him, and
7 Hernandez answered that "West Siders" did. Hernandez
8 attempted to explain where he was jumped, but after Singh told
9 him the location did not make sense, he provided a different
10 location.

11 Officer Cory Gustafson went to Hernandez's location and
12 attempted to place evidence bags on Hernandez's hands.
13 Hernandez opened and closed his hands, causing the bags to fall
14 off. Eventually, Gustafson was able to secure the bags to
15 Hernandez's hands with medical tape.

16 Paramedics arrived at D.'s apartment to transport D. to the
17 hospital. On the way, she was taken to the location where
18 Hernandez had been detained. A standard admonishment was
19 read to her. When police shined their spotlight on Hernandez, D.
20 said, "Yes, that's him." However, D. was subsequently unable to
21 identify Hernandez in a live lineup, but did identify him in court
22 at trial.

23 D. was taken to the hospital for a sexual assault examination.
24 When she arrived, she had bloodstains on her bra and shirt. There
25 were multiple bruises on her arms and legs. She had abrasions
26 and bruising below her left breast, on her left cheekbone, and on
27 her lower lip. Some of her teeth were loose.

28 A genital examination revealed multiple abrasions and
tenderness to the inguinal fold. There were large purple bruises
on her genital and anal areas. Her labia, urethra, and cervix were
bruised and bleeding. D. had a severe laceration in her vaginal
and perineum area, which required sutures.

A sexual assault exam also was performed on Hernandez. There
were injuries on his right hand. The nurse swabbed Hernandez's
hands, genital areas, and mouth for DNA.

1 Detectives Aaron Messick and Dorian Meneses interviewed
2 Hernandez at the police station around 7:00 a.m. on January 12,
3 2013. Hernandez waived his *Miranda* rights and agreed to make
4 a statement. Hernandez told the detectives that he went to a bar
5 called the Rat Cellar, then to another bar called the Tavern, where
6 he met up with a friend. He decided to go to his friend's house.
7 He was walking southbound on Fifth Street when some men
8 showed up and followed him. They got into a fight. Hernandez
9 jumped over a few fences, ended up on Hamilton, and was
10 stopped by the police.

11 Messick asked Hernandez for the friend's name, but Hernandez
12 refused to provide it. Messick asked Hernandez if the men
13 following him had hit him. Hernandez said they hit him in the
14 head. Hernandez added that there were three men. He would not
15 tell Messick who they were because it would not be "in [his] best
16 interests." However, Hernandez stated that they hit him with a
17 piece of metal or a stick, he ran away, they chased after him, and
18 he was stopped by the police.

19 Messick told Hernandez that one of the arresting officers saw
20 him throw something red as he ran, and asked Hernandez what
21 he threw. Hernandez denied throwing anything. Asked if he hid
22 in someone's house, Hernandez said no, he just ran. He ran
23 through a house but was not holding a red object. He jumped over
24 a few fences and crossed through some apartments. When he
25 exited, he was placed under arrest.

26 Messick urged Hernandez to tell the truth, and asked him why he
27 broke into D.'s apartment. Hernandez told Messick he did not
28 break into an apartment, he passed by the apartment and went
over the fence. Asked, "Why did you do it?," Hernandez
responded, "Why did I do what? The truth is I owed some
money." When Messick asked Hernandez who he owed money
to, Hernandez said, "T[w]o dudes from West Side." Hernandez
refused to give Messick the names of the "dudes." Messick asked
Hernandez, "Is that why you broke into the apartment?"
Hernandez responded, "What apartment?" Hernandez claimed
he ran through a couple of apartments but did not have time to
break into them.

1 Hernandez then told Messick he went into an apartment, but he
2 was “pretty wasted.” A friend of Hernandez’s broke the window
3 and entered first. Hernandez heard screaming, so he followed. D.
4 was on the floor. Hernandez grabbed an object to hit his friend,
5 then changed his mind and ran out. An alarm went off and his
6 friend left.

7 Messick asked Hernandez what happened while he was in the
8 apartment. Hernandez told Messick that he saw D. on the floor.
9 Hernandez’s friend was “all over her.” Hernandez picked up an
10 object so he could hit the friend. He decided against it, left, and
11 was stopped by the police. Asked how he broke the window,
12 Hernandez insisted he did not, saying the door was open and he
13 went inside. Messick asked Hernandez how he got blood on his
14 sweatshirt. Hernandez said he did not know. Asked again,
15 Hernandez said the blood was from his fight with West Side gang
16 members.

17 Before the fight, Hernandez’s friend said, “Let’s make some
18 money.” The friend broke D.’s window. Hernandez waited
19 outside as a lookout. He heard screaming, went in, and prepared
20 to hit the friend. He did not and instead ran out. He did not hurt
21 D. and the blood was not hers. He had no idea where it came
22 from.

23 Messick asked Hernandez how long he and his friend had known
24 each other. Hernandez said they had been acquaintances for a
25 while, then claimed people would come after him if he provided
26 police with the friend’s name. Hernandez added that the friend
27 lived on Hamilton, a couple of houses down from D. Asked what
28 the friend looked like, Hernandez responded that he was “skinny,
a tweaker.” Messick told Hernandez he needed a name or a street
name. Hernandez refused, saying he did not want to be killed in
jail or on the street. Finally, Hernandez said his friend’s
nickname was “Chino” and he was 24 years old.

Messick again asked Hernandez, “Why did you do it?” He
responded that he needed money. He then elaborated that Chino
broke D.’s window and went in. Hernandez paced back and forth
outside. He heard screams and walked inside. D. was on the
floor. Chino was leaning over her. Hernandez grabbed an object

1 to hit Chino, decided not to, and walked out. Hernandez stated
2 that no one was supposed to be home and denied raping D.

3 After the interview, Meneses went to the address on Hamilton
4 where Hernandez said Chino lived. A woman named Yesenia
5 Orozco was outside. Orozco told Meneses that Chino was her
6 son, Gabriel Ortiz. She added that he was not living at the
7 residence and had not been there for about a month. Instead,
8 Ortiz had been staying with his aunt in El Monte at the time the
9 crimes were committed.

10 Elias Valencia, a criminalist with the Department of Justice
11 laboratory in Riverside, examined items of evidence collected in
12 this case. Valencia explained that he followed the procedures
13 outlined in the lab's technical manual, including precautions to
14 prevent contamination.

15 Valencia selected items for DNA analysis. From D.'s sexual
16 assault exam kit, he selected a saliva reference sample, fingernail
17 scrapings, samples from her left and right breasts, and samples
18 from her neck. From Hernandez's sexual assault exam kit, he
19 selected samples from his left second and fourth fingers, saliva
20 reference samples, and fingernail scrapings.

21 Valencia looked at the bags used on Hernandez's right hand. The
22 interior bag was torn and the exterior bag was sealed. Stains on
23 the interior bag tested positive for blood. There also was blood
24 on the interior bag used on Hernandez's left hand. Valencia cut
25 out some samples from the bag and stored them.

26 Valencia examined the plastic water bottle collected from D.'s
27 apartment. It had no lid and was empty. Valencia saw white
28 residue and a possible hair near the lid. He collected the hair,
swabbed the residue, and packaged the hair and swab for DNA
analysis.

Valencia noted several stains on Hernandez's sweatshirts with
most of the stains on the cuffs. The stains tested positive for
blood. Valencia collected a stained piece of toilet paper, which
was in the right front pocket of the sweatshirt. He also collected
hairs he found near the bottom of the hem.

1 Valencia examined the broken candle holder found in D.'s
2 apartment. There were blood stains on the stem and on the base.
3 The items tested negative for feces.

4 Marla Richardson, another analyst with the Riverside laboratory,
5 conducted the DNA testing on evidence collected by Valencia.
6 Richardson stated that she followed the proper protocol to
7 prevent contamination of the evidence.

8 Richardson determined that the candle cup holder contained a
9 mixture of DNA from two or more persons. D. was the major
10 female donor. There was a minor trace from an unknown male.
11 Because Richardson did not have enough DNA for comparison,
12 she sent the sample to the Department of Justice laboratory in
13 Richmond for further testing.

14 Hernandez was the minor donor from the fingernail scrapings on
15 his left hand, while D. was the major donor. There was a
16 substantial amount of DNA, which was unusual. D. and
17 Hernandez were equal donors to DNA taken from Hernandez's
18 right hand fingernail scrapings.

19 The swab from the bottom of the water bottle contained DNA
20 from at least two people. D. was the major female donor. There
21 was very little DNA from the second person. The red brown
22 stains on the water bottle were consistent with a single source, D.
23 Hernandez was excluded as a donor.

24 Hernandez was the major donor to the bloodstain from the
25 interior brown paper bag placed on his hand. There was not
26 enough information to determine the minor donor.

27 Richardson ran control samples, her work was reviewed, and
28 there was no indication of contamination. However, when she
analyzed D.'s control sample, she detected a trace amount of
male DNA, which indicated it had been contaminated. As such,
Richardson sent the sample to the laboratory in Richmond for
further analysis.

Meghan Gray, a senior criminalist with the Department of Justice
laboratory in Richmond, performed more sophisticated testing
on D.'s reference sample. She tested it against DNA from

1 Riverside laboratory employees, Hernandez, Gabriel Ortiz, and
2 the emergency room physician who treated D. It did not match
3 any of these individuals.

4 Defense

5 Hernandez testified at trial in his defense. He stated that on the
6 evening of the crimes, he had been out drinking with some
7 friends. He met up with a friend named Alan Fuentes. They
8 walked to Circle K to buy some beer, then proceeded to Fuentes's
9 house across the street. It was about 3:00 a.m. As Hernandez and
10 Fuentes were outside drinking beer, three or four people showed
11 up and a fight ensued. Hernandez ran away and cut through some
12 apartments. Hernandez ended up on Hamilton and decided to see
13 if Gabriel Ortiz was awake. He had known Ortiz about two years.
14 Ortiz was outside smoking a cigarette and acting strange. Ortiz
15 mentioned the possibility of breaking into an empty house.
16 Hernandez agreed to accompany Ortiz.

17 While Ortiz went inside D.'s apartment complex, Hernandez
18 stood across the street acting as a lookout. Hernandez heard glass
19 shatter and then about a minute or so later he heard an alarm go
20 off. He walked toward the apartments and as he came closer he
21 saw an apartment door semiopened. Hernandez pushed the door
22 open with his foot and saw Ortiz standing over a woman. The
23 woman was on her stomach and Hernandez could see her bare
24 legs. The woman was crying and screaming. Hernandez grabbed
25 an object off a table as he came into the apartment because he
26 saw what was happening and his first instinct was to hit Ortiz.
27 He did not see Ortiz do anything to the woman. He was inside
28 her apartment maybe 25 to 30 seconds. Wanting no trouble,
Hernandez ran. Realizing his fingerprints were on the object he
grabbed, he took the object with him.

Ortiz came outside. Hernandez was mad because he thought no
one was going to be at home and swung at Ortiz. Ortiz grabbed
his arms. Hernandez heard police cars coming and left walking
northbound out of the apartment complex through the front gate.
He did not know where Ortiz went. He threw the candle holder
inside of a fence.

1 After his arrest, he eventually admitted being involved in the
2 burglary. Hernandez testified that he received a cut on his ear
3 from his son. He believed the marks underneath his nose were
4 from the fight he had been in earlier that night and that he got
5 blood on his clothes when Ortiz grabbed him. He did not identify
6 Ortiz right away because he did not want to be seen as a snitch.
7 He denied assaulting D. and did not know Ortiz was going to
8 attack her. He did not think anyone was inside the apartment. He
9 was only interested in taking property from the apartment.

10 Suzanna Ryan, a private forensic DNA consultant, noted that
11 D.'s reference sample was contaminated. She testified that
12 although it is possible the source of the contamination was the
13 gauze pad used to take the sample, the more likely source was
14 the Riverside laboratory.

15 According to Ryan, the Department of Justice forensic manual
16 recommends extracting evidence from a victim and suspect at
17 different times or places. This guideline was not followed in the
18 instant matter, in that the paper bags over Hernandez's hands
19 were processed at the same time as the water bottle, and the cuff
20 of his sweatshirt was processed during the same sequence as the
21 red brown stain from the label on the water bottle. Ryan also
22 testified that if a third party assaulted D., came into contact with
23 Hernandez, and D.'s blood was transferred to Hernandez's
24 sweatshirt, D.'s DNA might show up on a test even if Hernandez
25 never touched her. Similarly, if that third party touched
26 Hernandez's hands, D.'s DNA might appear under Hernandez's
27 fingernails.

28 **II. State Court Trial**

On October 21, 2014, a jury found Petitioner guilty of: (1) sexual battery by restraint
(Count One); (2) two counts of sexual penetration by foreign object by force, fear or threats
(Counts Two and Three); (3) assault with the intent to commit sexual penetration by foreign
object by force, fear or threats (Count Four); and (4) first degree burglary (Count Five).
See Lodgment 3-3 at 8-18; Lodgment 7 at 2.

The jury also found true the following special allegations: (1) that in the commission
of the crimes alleged in Counts Two and Three, Petitioner personally inflicted great bodily

1 injury on the victim; (2) that Petitioner committed the crimes alleged in Counts Two, Three
2 and Four during the commission of first degree burglary; and (3) that during the
3 commission of the burglary charged in Count Five, there was a person present who was
4 not Petitioner's accomplice. See Lodgment 3-3 at 8-18; Lodgment 7 at 2.

5 Petitioner was sentenced to sixty years to life in state prison. See Lodgment 3-3 at
6 107-110; Lodgment 7 at 2.

7 **III. Appeal to the California Court of Appeal**

8 On January 8, 2015, Petitioner appealed his conviction to the California Court of
9 Appeal, arguing: (1) ineffective assistance of trial counsel; (2) insufficient evidence to
10 support a great bodily injury enhancement on Count Two; (3) that Petitioner's conviction
11 for first-degree burglary should be reversed; (4) that Petitioner's burglary sentence be
12 stricken; (5) a violation of due process in the trial court's instruction to the jury on assault
13 with intent to commit penetration with a foreign object; (6) that Petitioner's conviction for
14 Count One should be deemed to run concurrently; (7) that Petitioner's abstract of judgment
15 required correction; and (8) that the Court of Appeals conduct an independent review of
16 the trial court's *in camera* review of materials pursuant to Petitioner's request for a new
17 trial. See Lodgment 4 at 24-60.

18 On March 4, 2016, the Court of Appeals reversed the jury's verdict on Counts Four
19 and Five and the jury's finding of great bodily injury in connection with Count Two, but
20 otherwise affirmed the judgment of conviction in all other aspects. See Lodgment 7 at 38.

21 **IV. Petition for Review to California Supreme Court**

22 On April 6, 2016, Petitioner filed a petition for review of the California Court of
23 Appeal's decision in the California Supreme Court. Lodgment 8. Petitioner presented the
24 same ineffective assistance of counsel ground previously presented in Petitioner's appeal
25 to the California Court of Appeal. See id. On May 24, 2016, the Supreme Court of
26 California denied Petitioner's petition for review. Lodgment 9.

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1 **V. Federal Habeas Petition**

2 On September 28, 2016, Petitioner filed a Petition for Writ of Habeas Corpus
3 pursuant to 28 U.S.C. § 2254 in this Court. See Pet. On October 7, 2016, the Court
4 dismissed the action without prejudice, holding that Petitioner had failed to name a proper
5 respondent in his original Petition. ECF No. 5 at 2-3. On October 31, 2016, Petitioner filed
6 an Amended Petition. See FAP.

7 On January 4, 2017, Respondent filed an Answer. ECF No. 15. The Court
8 subsequently granted several of Petitioner's requests to extend the time to file a traverse.
9 See ECF Nos. 31, 46, 50, 55, 57, 64, and 67. Despite numerous extensions, Petitioner did
10 not file a traverse. See Docket. The Court thereafter took the matter under submission.

11 **SCOPE OF REVIEW**

12 Title 28, United States Code, § 2254(a), sets forth the following scope
13 of review for federal habeas corpus claims:

14 The Supreme Court, a Justice thereof, a circuit judge, or a district
15 court shall entertain an application for a writ of habeas corpus in
16 behalf of a person in custody pursuant to the judgment of a State
17 court only on the ground that he is in custody in violation of the
18 Constitution or laws or treaties of the United States.

19 Petitioner's FAP was filed after enactment of the Anti-terrorism and Effective Death
20 Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214. Accordingly, the
21 AEDPA applies to the FAP.

22 Under 28 U.S.C. § 2254(d), as amended by AEDPA:

23 (d) An application for a writ of habeas corpus on behalf of a
24 person in custody pursuant to the judgment of a State court shall
25 not be granted with respect to any claim that was adjudicated on
26 the merits in State court proceedings unless the adjudication of
27 the claim—
28

1 (1) resulted in a decision that was contrary to, or involved an
2 unreasonable application of, clearly established Federal law, as
3 determined by the Supreme Court of the United States; or

4 (2) resulted in a decision that was based on an unreasonable
5 determination of the facts in light of the evidence presented in
6 the State court proceeding.

7 In making this determination, a court may consider a lower court's analysis. Ylst v.
8 Nunnemaker, 501 U.S. 797, 803-04 (1991) (authorizing a reviewing court to look through
9 to the last reasoned state court decision). Summary denials are presumed to constitute
10 adjudications on the merits unless "there is reason to think some other explanation for the
11 state court's decision is more likely." Harrington v. Richter, 562 U.S. 86, 98-101 (2011).

12 A state court's decision is "contrary to" clearly established federal law if the state
13 court: (1) "applies a rule that contradicts the governing law set forth in [Supreme Court]
14 cases"; or (2) "confronts a set of facts that are materially indistinguishable from a decision
15 of [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court]
16 precedent." Williams v. Taylor, 529 U.S. 362, 405-06 (2000).

17 A state court's decision is an "unreasonable application" of clearly established
18 federal law where the state court "identifies the correct governing legal principle from
19 [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the
20 prisoner's case." Lockyer v. Andrade, 538 U.S. 63, 75 (2003) (quoting Williams, 529 U.S.
21 at 413). "[A] federal habeas court may not issue [a] writ simply because that court
22 concludes in its independent judgment that the relevant state-court decision applied clearly
23 established federal law erroneously or incorrectly. Rather, that application must be
24 objectively unreasonable." Id. at 75-76 (citations and internal quotation marks omitted).
25 Clearly established federal law "refers to the holdings, as opposed to the dicta, of [the
26 Supreme] Court's decisions as of the time of the relevant state-court decision." Williams,
27 529 U.S. at 412.

28 If the state court provided no explanation of its reasoning, "a habeas court must
determine what arguments or theories supported or . . . could have supported, the state

1 court's decision; and then it must ask whether it is possible fairminded jurists could
2 disagree that those arguments or theories are inconsistent with the holding in a prior
3 decision of [the Supreme Court]." Harrington, 562 U.S. at 102. In other words, a federal
4 court may not grant habeas relief if any fair-minded jurist could find the state court's ruling
5 consistent with relevant Supreme Court precedent. Id.

6 Habeas relief is also available if the state court's adjudication of a claim "resulted in
7 a decision that was based on an unreasonable determination of the facts in light of the
8 evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(2); Wood v. Allen,
9 558 U.S. 290, 293 (2010). A state court's decision will not be overturned on factual grounds
10 unless this Court finds that the state court's factual determinations were "objectively
11 unreasonable in light of the evidence presented in state-court proceeding[.]" See Miller-El,
12 537 U.S. at 340. This Court will presume that the state court's factual findings are correct,
13 and Petitioner may overcome that presumption only by clear and convincing
14 evidence. See 28 U.S.C. § 2254(e)(1); Schiro v. Landrigan, 550 U.S. 465, 473-474 (2007).

15 ANALYSIS

16 Petitioner presents a single ground for federal habeas relief consisting of four
17 subclaims: (1) denial of due process; (2) denial of the right to a fair trial; (3) denial of the
18 right to present a complete defense of third-party culpability; and (4) ineffective assistance
19 of counsel.

20 Specifically, Petitioner asserts:

21
22 Petitioner was denied due process, a fair trial, and the right to
23 present a complete defense of third party culpability, and the
24 effective assistance of counsel when, without a request for a
25 competency hearing, the trial court allowed the very witness
26 petitioner accused of committing the offenses to testify in front
27 of the jury and then struck his testimony after finding the witness
28 incompetent to testify.

FAP at 10.

Respondent argues that: (1) Petitioner's mere reference to the Due Process clause and a right to a fair trial "is insufficient to render claims viable under the Fourteenth Amendment"; (2) Petitioner's ineffective assistance of counsel claim must fail as Petitioner has failed to show deficient performance or prejudice; and (3) Petitioner's right to present a complete defense claim must fail "because he has no right to introduce incompetent evidence[.]" ECF No. 15-1 at 16-28.

I. Ineffective Assistance of Counsel

Petitioner alleges his trial counsel was constitutionally ineffective by failing to request that the trial court hold a competency hearing for Gabriel Ortiz prior to having Mr. Ortiz testify at trial. See FAP at 16-26.

Respondent counters that: (1) the California Court of Appeal concluded correctly that Petitioner's trial counsel made a tactical decision not to have Mr. Ortiz testify and (2) Petitioner failed to show any prejudicial effect. ECF No. 15-1 at 23-28.

Petitioner presented this claim to the California Supreme Court in a Petition for Review. Lodgment 8. On May 18, 2016, the California Supreme Court summarily denied the petition without a statement of reasoning or citation of authority. Lodgment 9. The Court therefore "looks through" this silent denial to the California Court of Appeal's opinion. See Ylst, 501 U.S. at 804 n.3.

The California Court of Appeal considered Petitioner's ineffective assistance of trial counsel claim and denied it as follows:

Here, Hernandez contends that his trial counsel was prejudicially ineffective because he failed to request a competency hearing prior to Ortiz appearing as a witness at trial. He notes that his primary defense was that Ortiz assaulted D. and Ortiz's appearance and testimony at trial eviscerated his defense.

To show that trial counsel's performance was constitutionally defective, an appellant must prove: (1) counsel's performance fell below the standard of reasonableness, and (2) the "deficient performance prejudiced the defense." (*Strickland v. Washington*)

(1984) 466 U.S. 668, 687-688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (*Strickland*)). Competency is presumed unless the record affirmatively excludes a rational basis for trial counsel's choice. (*People v. Ray* (1996) 13 Cal.4th 313, 349, 52 Cal. Rptr. 2d 296, 914 P.2d 846; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1260, 74 Cal. Rptr. 2d 212, 954 P.2d 475.) We reverse on the ground of inadequate assistance on appeal only if the record affirmatively discloses no rational tactical purpose for counsel's act or omission. (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437, 48 Cal. Rptr. 2d 525, 907 P.2d 373 (*Lucas*); see *Ray*, *supra*, at p. 349.)

Hernandez's claim of ineffective counsel arises from his trial counsel's failure to request a competency hearing as to Ortiz. However, we generally defer to the tactical decisions of trial counsel. (See *People v. Scott* (1997) 15 Cal.4th 1188, 1212, 65 Cal. Rptr. 2d 240, 939 P.2d 354; *People v. Holt* (1997) 15 Cal.4th 619, 703, 63 Cal. Rptr. 2d 782, 937 P.2d 213.) "[T]here is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" (*Lucas*, *supra*, 12 Cal.4th at p. 437, quoting *Strickland*, *supra*, 466 U.S. at p. 689.)

Hernandez insists that it was "inexplicable" that his trial counsel did not request the court to make a preliminary finding of Ortiz's competency, and as such, his trial counsel's representation of Hernandez fell below the appropriate standard of reasonableness. To this end, Hernandez points out that his trial counsel should have been on notice for the need of a competency hearing. For example, at trial, Meneses testified that, in her experience talking to Ortiz, Ortiz would struggle to answer simple questions. Ortiz's mother testified that Ortiz had some sort of disability. In addition, Hernandez notes that, prior to Ortiz being called as a witness at trial, the court examined him outside the presence of the jury, and "it was rather patently clear Ortiz was a problem witness." Indeed, in the middle of the court's discussion with Ortiz, the prosecutor commented that she had "grave doubt" about Ortiz's competency.

Against the background, Hernandez essentially argues that his trial counsel had to realize that a competency hearing was necessary, especially considering that Hernandez's primary

1 defense theory was that Ortiz actually attacked the victim. We
2 are not persuaded. Although we agree with Hernandez that his
3 trial strategy was to argue that Ortiz assaulted D., we cannot say
4 with any kind of certainty that Hernandez's trial attorney had no
5 strategic reason for having Ortiz testify without first moving for
6 a competency hearing. Indeed, until Ortiz actually did testify,
the record supports the inference that Hernandez's trial attorney
wanted Ortiz to testify at trial.

7 Hernandez's trial attorney objected to Meneses's testimony to
8 the extent she was offering an opinion as to Ortiz's cognitive
9 ability. Further, in cross-examining Meneses, Hernandez's trial
10 attorney tried to frame Ortiz's inconsistent answers to
11 Meneses's questions as evidence that Ortiz was lying to the
12 detective, and as such, Meneses's investigation of the subject
13 crimes was lackluster because she did not more aggressively
14 pursue Ortiz as a suspect. Also, after the court questioned Ortiz
15 outside the presence of the jury, asking him if he had been
16 subpoenaed and whether he would like counsel appointed, and
17 the prosecutor expressed her doubts that Ortiz could understand
18 what was going on, Hernandez's trial counsel pushed for the
19 court to appoint Ortiz counsel. Further, defense counsel
20 emphasized that he anticipated that there would be a "lengthy
21 examination" of Ortiz "based upon his behavior before the
22 Court just now." Hernandez's trial counsel even expressed
23 doubt regarding how productive any examination of Ortiz
24 would prove: "And I don't know how much information we're
25 really going to get out of him at this point in time." The court
26 agreed, but stated that it did not know how an appointed
27 attorney would help the attorneys elicit more information from
28 Ortiz when he testified. Hernandez's trial attorney countered by
arguing that if Ortiz had an attorney, that attorney would
"probably advise him that he has this right and he should
exercise it. That would probably be my advice to him if I was
representing him based upon representations that were made
with the Court right now. So for that reason, that's why I'm
asking for the appointment." In other words, Hernandez's trial
attorney wanted the court to appoint counsel for Ortiz so that
counsel would advise Ortiz to take the Fifth Amendment and
refuse to testify at trial. Defense counsel appears to have made
the tactical decision to have Ortiz appear as a witness at trial
only to take the Fifth Amendment. Ortiz could not do so if the

1 court found him to be incompetent prior to trial. Accordingly,
2 the record supports at least a plausible strategic reason for
3 defense counsel not to challenge Ortiz's competency.

4 Only after Ortiz proved to be a difficult witness for both the
5 prosecution and the defense at trial did Hernandez's trial
6 counsel state that he did not believe Ortiz should have taken the
7 stand in the first place. Based on the cold record before us,
8 defense counsel's comments are made with the benefit of
9 hindsight. This is not sufficient to render implausible the
10 possibility that Hernandez's trial counsel made the strategic
11 decision that Ortiz should be called as a witness at trial.

12 Further, even we were to assume that Hernandez's trial
13 counsel's representation of Hernandez fell below the applicable
14 reasonable standard, we conclude that Hernandez has not
15 shown that he was prejudiced by his counsel's actions. (See
16 Strickland, supra, 466 U.S. at pp. 687-688.) After the court
17 determined that Ortiz was incapable of testifying, it advised
18 jurors that they could not consider his testimony for any
19 purpose. We presume jurors followed the instruction and did
20 not base their decision on the stricken testimony. (People v.
21 Hovarter (2008) 44 Cal.4th 983, 1005, 81 Cal. Rptr. 3d 299,
22 189 P.3d 300.)

23 Moreover, although the court allowed jurors to consider Ortiz's
24 demeanor while he was testifying, they heard other testimony
25 that Ortiz struggled to answer simple questions. For example,
26 Meneses testified that when she spoke to Ortiz on September
27 15, 2014, Ortiz gave various statements and conflicting
28 responses. Meneses explained:

“Probably the easiest way to illustrate this is to provide an
example of his — the way he answers would be, say, simple
question would be if he is wearing a black shirt, within that
same answer he could say, yes, yes, no, yes, no, and you can
see just — I can see, not you, I can see that he is having
problems with his thought process in answering just that simple
question. It's like that with him whenever you ask him any
other questions. Again, I have seen this throughout my
interactions with Mr. Ortiz in the past as well. That's what I

1 meant by cognitive issues. It's something you can't really
2 fake."

3 Additionally, during closing argument, defense counsel
4 commented about Ortiz's demeanor at trial. He told jurors that
5 if Hernandez were responsible for the sexual assault, he would
6 have taken the water bottle with him and disposed of it.
7 Hernandez's demeanor on the stand, counsel argued, showed he
8 was a rational and intelligent person; and disposal of the
9 evidence is what a rational person would do. Ortiz, however,
10 would not think this way, "because he seemed to be a fairly
11 irrational person by most people's standards." Hernandez's trial
12 counsel also reminded jurors that Ortiz's behavior "was strange
13 and bizarre by any standards." He told the jury that Ortiz was
14 "putting on an act" to get out of court, was under the influence
15 of drugs, or was mentally ill. In any case, defense counsel
16 argued that Ortiz's behavior was suspect. Hernandez's trial
17 counsel suggested to the jury, "Would you feel safe sitting next
18 to Gabriel Ortiz? I sure wouldn't."

19 In addition, the evidence of Hernandez's guilt was
20 mountainous. When D. saw Hernandez at a curbside line up,
21 she immediately yelled, "That's him." D. said she was 100
22 percent sure Hernandez was the person who attacked her. D.
23 also identified Hernandez in court. The police saw Hernandez
24 near D.'s apartment shortly after the crimes were committed.
25 Hernandez matched the description D. had given of her
26 assailant.

27 When the police saw Hernandez near D.'s apartment complex,
28 they ordered Hernandez to stop, but he kept walking. He had
blood on his face, around his wrists, and on his clothes.
Hernandez refused to tell the officers what he was doing in the
area. Asked why he was bloody, Hernandez claimed some gang
members jumped him near two intersecting streets that were
actually parallel to each other. When the inconsistency was
pointed out to Hernandez, he named a different location.
Hernandez attempted to prevent officers from bagging his
hands for evidence. Before Hernandez was detained, he
tossed the candle holder he used in the assault over a fence.
Hernandez had injuries to his hands and face consistent with a
struggle with the victim. D.'s DNA was found on fingernail

1 scrapings taken from Hernandez’s hands and from blood found
2 on Hernandez’s sweatshirt. In talking to the police, Hernandez
3 changed his story about what he was doing on the night in
4 question. It was not until the end of the interview that he even
5 mentioned that Chino (Ortiz) had attacked D. At trial,
6 Hernandez offered yet additional detail about what occurred on
7 the night in question providing another version of events.

8 In comparison, other than Hernandez’s suggestion that Ortiz
9 assaulted D., there is no indication in the record that Ortiz was
10 involved in the subject crimes. D. gave a statement to the police
11 and testified at trial, and never wavered from her account that
12 only one person - Hernandez - was in her apartment that night.
13 Ortiz’s DNA was not on any of the items of the evidence or on
14 the victim, and he was not at the scene that night. And, Ortiz’s
15 mother told police, and repeated at trial, that Ortiz was in Los
16 Angeles County at the time the crimes were committed.
17 In summary, there was no prejudice to Hernandez and his
18 ineffective assistance of counsel claim therefore must fail.
19 (*People v. Gray* (2005) 37 Cal.4th 168, 209.)

20 Lodgment 7 at 14-26.

21 **a. Analysis**

22 “The right to counsel is the right to the effective assistance of counsel.” Strickland
23 v. Washington, 466 U.S. 668, 686 (1984) (citations omitted). “The benchmark for judging
24 any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper
25 functioning of the adversarial process that the trial cannot be relied on as having produced
26 a just result.” Id.

27 To prove ineffective assistance of counsel, a defendant must show: (1) that counsel’s
28 performance was deficient; and (2) that this deficient performance prejudiced the
defense. Id. at 687. The proper measure of attorney performance is “simply reasonableness
under prevailing professional norms.” Id. at 688.

In assessing the reasonableness of counsel’s performance, the Court “must be highly
deferential, avoid the distorting effects of hindsight, and indulge a strong presumption that
[counsel’s] conduct falls within the wide range of reasonable professional assistance.”

1 Williams v. Woodford, 384 F.3d 567, 610 (9th Cir. 2002), cert. denied, 546 U.S. 934
2 (2005) (quoting Strickland, 466 U.S. at 689). Courts judge the reasonableness of an
3 attorney's conduct "on the facts of the particular case, viewed as of the time of counsel's
4 conduct." Strickland, 466 U.S. at 690. The Court may "neither second-guess counsel's
5 decisions, nor apply the fabled twenty-twenty vision of hindsight[.]" Karis v.
6 Calderon, 283 F.3d 1117, 1130 (9th Cir. 2002), cert. denied, 539 U.S. 958 (citation and
7 quotations omitted); see Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth
8 Amendment guarantees reasonable competence, not perfect advocacy judged with the
9 benefit of hindsight") (citations omitted).

10 To determine whether errors of counsel prejudiced the defense, a court "must
11 consider the totality of the evidence before the judge or jury" and consider whether "the
12 defendant has met the burden of showing that the decision reached would reasonably likely
13 have been different absent the errors." Strickland, 466 U.S. at 696. The Court need not
14 address both the deficiency prong and the prejudice prong if the defendant fails to make a
15 sufficient showing of either one. Id. at 697.

16 An AEDPA review of claims alleging ineffective assistance of counsel must be
17 "doubly deferential in order to afford both the state court and the defense attorney the
18 benefit of the doubt." Woods v. Donald, 135 S. Ct. 1372, 1376 (2015) (citations and
19 quotations omitted). Under this standard of review, the Court finds the California Court of
20 Appeal's denial of Petitioner's claim was not contrary to or an unreasonable application of
21 clearly established law, nor was it based on an unreasonable determination of fact.

22 Here, the Court of Appeal's conclusion that "until Ortiz actually did testify, the
23 record supports the inference that [Petitioner]'s trial attorney wanted Ortiz to testify at trial"
24 is well supported by the record. Lodgment 7 at 21. It is reasonable to conclude Petitioner's
25 trial counsel considered the effect that Mr. Ortiz's cognitive state would have on the
26 defense's case and deliberately chose not to request a competency hearing in an attempt to
27 elicit potentially exculpatory statements from Mr. Ortiz on the stand. See Delao v.
28 Kirkland, 2009 U.S. Dist. LEXIS 23053, at *47 (C.D. Cal. Jan. 6, 2009) (counsel did not

1 provide ineffective assistance where record showed counsel considered effect of witness'
2 mental state on defense case and made a reasoned decision not to ask court to disqualify
3 the witness); Conerly v. Lewis, 2006 U.S. Dist. LEXIS 59794, at *40 (E.D. Cal. Aug. 14,
4 2006) (defense counsel's failure to request competency hearing not ineffective assistance
5 where witness testimony was helpful to defense).

6 In fact, Petitioner's trial counsel did not argue Mr. Ortiz should not have testified
7 until after the trial court already declared Mr. Ortiz incompetent. Lodgment 1-17 at 95-96.
8 This only occurred after Petitioner's trial counsel had had the opportunity to cross-examine
9 Mr. Ortiz and became unable to elicit any responses from him. Id. at 79-94. Prior to this,
10 Petitioner's trial counsel represented to the trial court that he actually felt "incumbent
11 upon" to ask Mr. Ortiz a "number of questions" and that he anticipated a "lengthy
12 examination." Id. at 87.

13 Petitioner argues the Court of Appeals erred by concluding his trial counsel made a
14 "tactical decision to have Ortiz appear as a witness at trial only to take the Fifth
15 Amendment." FAP at 18-20. In support, Petitioner cites to California Evidence Code § 913
16 and the Supreme Court of California's decision in People v. Mincey, 2 Cal. 4th 408 (1992)
17 in support. Id.

18 Evidence Code § 913, subdivision (a) provides that "no presumption shall arise"
19 from a witness's exercise of the privilege self-incrimination, and the "trier of fact may not
20 draw any inference therefrom as to the credibility of the witness or as to any matter at issue
21 in the proceeding." Subdivision (b) provides that "at the request of a party who may be
22 adversely affected," the Court shall instruct the jury to draw no inferences from a witness's
23 invocation of the Fifth Amendment as to the witness's credibility or any other matter at
24 issue in the proceeding.

25 In People v. Mincey, the California Supreme Court upheld a trial court's decision
26 denying a defendant's request to force a witness to invoke the Fifth Amendment privilege
27 in front of a jury. 2 Cal. 4th at 440-42. The California Supreme Court held that pursuant to
28 Evidence Code 913(b), even "[i]f the trial court . . . had permitted defendant to compel [the

1 witness] to assert the privilege in front of the jury, it would have been required, on request,
2 to instruct the jury not to draw the very inference defendant sought to present to the jury.”
3 Id. at 442.

4 Although Petitioner labels this argument as a federal ineffective assistance of
5 counsel claim, it appears Petitioner is asking this Court to find that the California Court of
6 Appeals erred in applying California evidentiary rules. Federal habeas relief may not be
7 based on alleged violations of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68
8 (1991) (“[I]t is not the province of a federal habeas court to reexamine state-court
9 determinations on state-law questions. In conducting habeas review, a federal court is
10 limited to deciding whether a conviction violated the Constitution, laws, or treaties of the
11 United States.”) (citations omitted); Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir.
12 1991) (A federal habeas court does not review “questions of state evidence law.”).

13 Even assuming that Petitioner alleged a valid federal issue, as already noted above,
14 compelling Mr. Ortiz to take the Fifth Amendment in front of the jury is not the only
15 plausible explanation for why Petitioner’s trial counsel would choose not to request a
16 competency hearing. As the California Court of Appeals concluded, it was “[o]nly after
17 Ortiz proved to be a difficult witness” that trial counsel “state[d] that he did not believe
18 Ortiz should have taken the stand in the first place.” Lodgment 7 at 23. Prior to this, the
19 record shows Petitioner’s trial counsel anticipated a lengthy examination of Mr. Ortiz to
20 elicit statements that would be beneficial to the defense. See Lodgment 1-17 at 87. With
21 the benefit of hindsight, this strategy may not have been effective. However, as the Court
22 of Appeals correctly held, determinations made in hindsight are “not sufficient to render
23 implausible the possibility that [Petitioner’s] trial counsel made the strategic decision that
24 Ortiz should be called as a witness at trial.” Lodgment 7 at 23; see Bashor v. Risley, 730
25 F.2d 1228, 1241 (9th Cir. 1984) (reasoned tactical decisions are not ineffective merely
26 because in retrospect better tactics may have been available).

27 Finally, even if counsel’s performance had been deficient, the Court nevertheless
28 concurs with the Court of Appeals that Petitioner has not shown prejudice. Here, after

1 finding Mr. Ortiz incompetent, the trial court not only struck Mr. Ortiz's testimony from
2 the record, but also provided an instruction to the jury it was not to consider Mr. Ortiz's
3 testimony for any purpose. Lodgment 1-17 at 98-99. These steps were appropriate methods
4 to overcome any potential prejudice suffered by Petitioner from Mr. Ortiz's testimony. A
5 jury is presumed to follow a trial court's instructions, and this Court sees no basis to find
6 that the jury did not do so in Petitioner's case. See Weeks v. Angelone, 528 U.S. 225, 234
7 (2000); Richardson v. Marsh, 481 U.S. 200, 206 (1987) (noting the "almost invariable
8 assumption of the law that jurors follow their instructions").

9 Although the state trial court allowed the jurors to consider Mr. Ortiz's demeanor on
10 the stand, Petitioner has also not shown how this was prejudicial to his defense. As the
11 Court of Appeals correctly opined, the jurors heard testimony from other sources regarding
12 Mr. Ortiz's inability to answer simple questions. Lodgment 7 at 23-24. See e.g., Lodgment
13 13 at 117-18, 121-23; 126-28.

14 Moreover, there is nothing to suggest Mr. Ortiz's demeanor was not actually helpful
15 to the defense. Indeed, Petitioner's trial counsel explicitly referenced Mr. Ortiz's demeanor
16 during closing, noting Mr. Ortiz's behavior on the stand was "strange and bizarre by any
17 standards" and specifically asking the jury if they would "feel safe sitting next to Gabriel
18 Ortiz?" Lodgment 1-19 at 1483. During closing, Petitioner's counsel also referenced Mr.
19 Ortiz's demeanor when arguing that the perpetrator of the crime had to have been irrational
20 given the evidence that been left at the scene—attempting to infer that the perpetrator was
21 not Petitioner, but Mr. Ortiz. Id. at 1465-66. Accordingly, it was not unreasonable for the
22 Court of Appeals to conclude Petitioner's defense was not prejudiced.

23 For these reasons, the Court **RECOMMENDS** that Petitioner's subclaim alleging
24 ineffective assistance of counsel be **DENIED**.

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II. Due Process, Right to a Fair Trial, Right to Present a Complete Defense

Petitioner asserts he was also denied “due process[,]” a “fair trial[,]” and the “right to present a complete defense of third party culpability” when the “trial court allowed the very witness petitioner accused of committing the offenses to testify in front of the jury and then struck his testimony after finding the witness incompetent to testify.” FAP at 10.

a. Exhaustion

While the Court is under no obligation to review the record to determine compliance with the AEDPA’s requirements, it may consider *sua sponte*, threshold issues such as exhaustion. See Day v. McDonough, 547 U.S. 198, 205-06 (2006). Here, the Court finds Petitioner did not properly develop his “due process,” “right to a fair trial” or “right to present a complete defense” subclaims in state court.

Generally, a federal court may not consider a petition for habeas corpus unless the petitioner has first presented his claims to the state courts, thereby “exhausting” them. 28 U.S.C.A. §2254(b)(1)(A); Rose v. Lundy, 455 U.S. 509, 522, (1982). “[E]xhaustion of state remedies requires that petitioners fairly present federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners’ federal rights[.]” Duncan v. Henry, 513 U.S. 364, 365 (per curiam) (citations and internal quotation marks omitted).

To satisfy the exhaustion requirement, the Petitioner must demonstrate that: (1) “he has ‘fairly presented’ his federal claim to the highest state court with jurisdiction to consider it”; or (2) “that no state remedy remains available.” Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996) (citations omitted). Claims are not exhausted by mere presentation to the state appellate system. A petitioner must also “alert[] [the state] court to the federal nature of the claim.” Baldwin v. Reese, 541 U.S. 27, 29 (2004).

A “conclusory, scattershot citation of federal constitutional provisions, divorced from any articulated federal legal theory” fails to satisfy the fair present requirement. Castillo v. McFadden, 399 F.3d 993, 1002-03 (9th Cir. 2004) (“Exhaustion demands more than drive-by citation, detached from any articulation of an underlying federal legal

theory.”). See Hiiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999) (“[G]eneral appeals to broad constitutional principles, such as due process, equal protection, and the right to a fair trial, are insufficient to establish exhaustion.”).

Here, Petitioner’s briefs to the California Court of Appeals and Supreme Court of California reference a due process and right to fair trial theory only briefly in a section heading. Lodgment 4 at 24; Lodgment 8 at 3. Petitioner’s briefs fail to cite to any authorities underlying these theories or articulate why his right to due process or his right to a fair trial were violated. See Lodgment 4, Lodgment 8.

Similarly, Petitioner’s brief to the California Court of Appeals contains only a passing reference to his “right to present a complete defense” in a section heading. Lodgment 4 at 24. Petitioner’s brief to the Supreme Court of California is only somewhat more detailed, providing a conclusory argument in a section heading and then a generic statement under the “Standard of Review” that:

Similarly, “Whether rooted directly in the Due Process Clause of the Fourteenth Amendment [citation], or in the Compulsory Process or Confrontation clauses of the Sixth Amendment [citations], the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” (*Crane v. Kentucky* (1986) 476 U.S. 683, 690 [106 S.Ct. 2142, 90 L.Ed.2d 636].) A defendant may present evidence in support of a relevant defense. (*California v. Trombetta* (1984) 467 U.S. 479,485 [104 S.Ct. 2528, 81 L.Ed.2d 413]; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302 [93 S.Ct. 1038, 35 L.Ed.2d 297].)

Lodgment 8 at 7, 10.²

² The *Crane v. Kentucky* case is directed to whether a state court erred in foreclosing a petitioner’s efforts to introduce testimony about the environment in which police secured his confession. 476 U.S. at 690-91. The *California v. Trombetta* decision is directed as to whether law enforcement agencies are required to preserve breathalyzer samples. 467 U.S. at 491. The *Chambers v. Mississippi* case is directed to a defendant’s right to confront and cross-examine witness and to call witnesses on the defendant’s behalf. 410 U.S. 294-95.

1 The Court is not persuaded that such a vague appeal fairly presented Petitioner's
2 federal constitutional issues to the state court. See Shumway v. Payne, 223 F.3d 982, 987
3 (9th Cir. 2000) (Petitioner's statement of the issues did not fairly present her federal
4 claim to the state court—"[i]t is not enough to make a general appeal to a constitutional
5 guarantee as broad as due process to present the 'substance' of such a claim to a state
6 court.") (citations omitted).

7 As any petition presented by Petitioner to the Supreme Court of California would
8 now be submitted over four years after Petitioner's conviction and be likely time barred,
9 the Court finds these subclaims are technically exhausted and procedurally defaulted in
10 this Court. See Sissac v. Montgomery, 2018 U.S. Dist. LEXIS 115658, at *50-51 (S.D.
11 Cal. July 11, 2018); Ramirez Guzman v. Madden, 2018 U.S. Dist. LEXIS 28021, at *22
12 (S.D. Cal. Feb. 21, 2018). The Court may still reach the merits of these claims if
13 Petitioner "can demonstrate cause for the default and actual prejudice as a result of the
14 alleged violation of federal law, or demonstrate that failure to consider the claims will
15 result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 750
16 (1991).

17 Here however, the Court need not conduct a lengthy analysis to determine whether
18 Petitioner could make a sufficient showing to excuse the default, because Petitioner's due
19 process, right to a fair trial, and right to present a complete defense subclaims are
20 insufficiently meritorious to provide for federal habeas relief for the reasons discussed
21 below. See Franklin v. Johnson, 290 F.3d 1223, 1232 (9th Cir. 2002) (it is proper to
22 proceed to merits where procedural bar issue is more complicated and result is the same).

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27 None of these cases provide a clear indication of Petitioner's constitutional theory under the right to
28 present a complete defense.

1 **b. Merits of Petitioner’s Subclaims for Violation of Due Process, Right to a**
2 **Fair Trial, and Right to Present a Complete Defense**

3 As there is no reasoned state decision to look to, the Court conducts an
4 independent review of the record to determine whether the trial court’s decisions were
5 objectively unreasonable. Based upon such a review, the court concludes that Petitioner is
6 not entitled to habeas relief on the instant subclaims.

7 The issue of whether the state trial court erred by permitting a witness to testify
8 without a competency hearing is a matter of state law that is not entitled to federal habeas
9 relief. See Schlette v. California, 284 F.2d 827, 834-835 (9th Cir.1960) (competency of
10 witness generally a matter of state law).

11 No “clearly established federal law” gives Petitioner a constitutional right
12 imposing a duty on state trial judges to determine the competency of a prosecution
13 witness in the absence of a challenge by the defense. See Delao, 2009 U.S. Dist. LEXIS
14 23053, at *59-60; Conerly, 2006 U.S. Dist. LEXIS 59794, at *40. Here, Petitioner’s trial
15 counsel raised no objection to Mr. Ortiz’s competency to testify until after he had already
16 been found incompetent, likely because Mr. Ortiz’s testimony could have been helpful to
17 the defense. Since no objection was raised, the trial court had no obligation to inquire
18 further. See Conerly, 2006 U.S. Dist. LEXIS 59794, at *41.

19 Further, after finding Mr. Ortiz incompetent to testify, the state trial court took the
20 appropriate steps of striking his testimony and instructing the jury not to consider Mr.
21 Ortiz’s testimony for any purpose. Lodgment 1-17 at 98-99. Petitioner has not shown
22 how this violates his rights to due process, a fair trial, or to present a complete defense.

23 For these reasons, the Court **RECOMMENDS** that Petitioner’s subclaims alleging
24 a violation of his rights to due process, right to a fair trial, and right to present a complete
25 defense be **DENIED**.

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IT IS HEREBY ORDERED that no later than **April 19, 2019**, any party to this action may file written objections with this Court and serve a copy on all parties. The document should be captioned “Objections to Report and Recommendation.”

IT IS SO ORDERED.

[Signature]

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